A Nation (Un)Dignified

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The recent jurisprudence of Hungarian apex courts based on changes inserted into the Hungarian Fundamental Law of 2011 and the provisions of the 2013 Civil Code on "violating the dignity of the Hungarian nation" set a dangerous precedent that could be broadly applied against critics of the government, aka the EU's first electoral autocracy. The present blog post critically analyses a judgment of the Hungarian Supreme Court (*Kúria*) of March 2021, which is highly likely to produce a chilling effect.

The Tóta W. / HVG controversy

The dispute concerns a short opinion piece entitled "Hungarians don't steal, they go on adventures" that columnist Árpád Tóta W. published back in 2018 in the online version of the weekly *Heti Világgazdaság* (Weekly World Economics, HVG). He blamed the prosecutor's office for halting the criminal procedure in a corruption case OLAF reported, against PM Orbán's son-in-law and his company. The criticism was embedded in the European context. The journalist urged EU institutions to step up much more forcefully against autocratising states. He made references to the use of EU money for purposes in violation of EU values, the slouch European procedures which play into the hands of authoritarians, the EPP's struggle to get rid of Fidesz, the soft nature of OLAF findings, and in general the failure to use dissuasive measures by EU institutions against backsliding governments. Nothing different than what many of us argue on this blog and elsewhere, only written in a much more entertaining manner.

The challenged part makes a parallel using some heavy irony. It discusses Hungary in the 2010s, where all checks to limit governmental powers and prevent corruption failed and only the EU, as an external form of militant democracy, could put a halt to democratic decay and constitutional decline. Today's Hungary is then compared to Hungarian troops ransacking across Europe some 1,100 years ago. They were not stopped by their ruler either, but it was Western Europeans, at the Battle of Lechfeld of 955, who finally put a halt to the violent crimes committed by "stinky Hungarian migrants" and "Hungarian bandits". The last two expressions in quotation marks were too much for two ordinary Hungarian citizens – represented by their lawyer, a former MP of the right-wing radical Jobbik party – who filed a lawsuit against HVG for having published a piece violating the "dignity of the Hungarian nation".

The court of first instance found a violation of the Civil Code, the court of second instance reversed the judgment, and finally the *Kúria* as the court of last instance agreeing with the first instance court, determined the media outlet's responsibility for publishing the article at dispute. (Case number: Pfv.IV.20.199/2020/7, 24 March 2021. The full judgment is available here.) The *Kúria* obliged the defendant to

remove the hurtful words from the publication and publish an apology, and awarded the plaintiffs 400.000 HUF (1.100 EUR) for a violation of their personality rights.

The Kúria judgment

Let us have a look at the laws first. The Fourth Amendment to the Fundamental Law inserted a relevant provision. According to Article IX (5), in force as of 1 April 2013, the right to free speech may not be exercised with the aim of violating the dignity of various communities, including that of the Hungarian nation. Members of the Hungarian nation can enforce their claims in court against hurtful expressions, invoking the violation of their human dignity. Making use of this constitutional authorization, the Civil Code of 2013 includes a corresponding provision in Article 2:54 (5) that can be directly referenced by plaintiffs in civil cases.

The two legal provisions were criticised for their potential chilling effect and for giving extra protection to powerful societal groups. Despite the controversial nature of the provisions, the court could have protected freedom of expression (and common sense). Instead, the *Kúria* justified its holding by a series of heavy mistakes in the reasoning, violating freedom of expression. Explaining a joke is a painful exercise, but let us make this sacrifice for the sake of the legal analysis.

1. The writing was about corruption in Hungary and the discontinuation of criminal proceedings against government allies and oligarchs suspected to be in breach of the law. Therefore, if anything, the *Kúria* should have assessed whether the current government's criticism violated the dignity of the Hungarian nation. Just for the record: it obviously did not, since the criticism was directed at the government, which cannot be equalled with the Hungarian nation – a deliberate confusion often entertained by Fidesz politicians.
2. But the court still finds the link in a logical twist that is difficult to grasp: it holds that the journalist "'extrapolated' his hurtful government criticism to the whole of the Hungarian nation, a community against whom he did not intend to exercise criticism." It's like a magic trick: the journalist did and did not criticise and violate the dignity of the Hungarian nation at the same time.
3. Just like government-criticism does not equal criticism of a whole nation, criticism of Hungarian troops 1,100 years ago does not equal criticism of all Hungarians back then.
4. Should we move to the parallel nevertheless, it is difficult to equate the mass of roving Hungarians with the current Hungarian nation. Not least because the nation state as a social construct came into being many centuries later. In this light it is highly questionable whether the plaintiffs would have standing at all.
5. Let us now move to the disputed words specifically. The court rightfully noticed that the word "migrant" had a pejorative connotation in Hungarian language, however failed to explore who the responsible entity was for turning this otherwise neutral term practically into a swearword. And even if it was a bad word in the eyes of some Hungarians falling for the government's anti-migrant rhetoric and policies, the court's role is not to reinforce existing prejudices. Most importantly, the journalist was using the term in a neutral manner.

6. Getting to the core of the criticism, the *Kúria* noticed that the use of the word "migrant" had to be interpreted in the context of political criticism, and the journalist intended to show a mirror to the xenophobic hate speech conducted by the government. In this context, the court argues that the use of the word "migrant" alone would still have fallen under the scope of free speech. But it was this word together with its adjective "stinky" and the noun "bandits" that was allegedly too much. And this is probably the weakest part of the judgment, where the court "became very lost in the labyrinth of literary comprehension." The *Kúria* notices the political context of the speech when analysing the word "migrant". But it loses its own line of argumentation when it comes to an assessment of the words "stinky" and "bandits". Here the *Kúria* does not realise the political context any more, and finds the words gratuitously hurtful.
7. In the *Kúria's* view freedom of expression is not unduly limited, since only two words needed to be deleted. Acting as a high school teacher reviewing a student essay, the *Kúria* continued its misplaced assessment: "the substantive content and the form of the speech were not in harmony". This view disregards how literary works, journalistic articles, humour or irony work.

A European consensus

Rule of law and fundamental rights decline is often justified by reference to an alleged Central Eastern European alternative definition of the mentioned values. But let me pre-empt such a claim by stating that the Hungarian understanding of free speech up until recently corresponded to the European Convention on Human Rights (ECHR) and the Strasbourg (ECtHR) case-law. The Hungarian Constitutional Court (HCC) consequently protected freedom of expression as it should be the case in democratic societies.

True, the constitutional landscape changed considerably with the insertion of Article IX (5) into the Fundamental Law, but it should not be used as a pretext to depart from the European consensus on freedom of expression. So far, Article IX (5) Fundamental Law and the corresponding Civil Code provision had a very scarce case law, but the jurisprudence is quickly evolving. The HCC interpreted the provisions in two decisions in February 2021, and in one of them, criticising the Polish abortion regime, again the dignity of the community – in this case the dignity of the largest religious community in Hungary, i.e. Catholics – prevailed.

Due to the specificities of the HVG case discussed, we still insist that the opinion piece of Árpád Tóta W. does not qualify as an impermissible expression, and that the *Kúria* manifestly departed from the established Article 10 ECHR compatible Hungarian understanding of freedom of expression.

Independence and accountability

One may wonder why the earlier rich and progressive free speech jurisprudence changed for the worse in 2021, whereas the *Kúria* could have adopted a free speech friendly judgment, even in light of the Fundamental Law and the Civil Code.

Media capture and the limitation of journalistic freedom cannot be dissociated from state, including court capture. Courts are not, but at the very minimum cannot be seen as independent in Hungary in the public eye. (See e.g. the Sargentini report triggering an Article 7(1) procedure against Hungary.) Commentators thus guessed whether the captured judiciary fulfilled some real or perceived government expectations. As the defendant's lawyer stated, the judgment does not only overturn 30 years of constitutional adjudication in Hungary, but also complies with the ideological preferences of the newly appointed President of the *Kúria*, who was elected against the veto of the vast majority of the National Council of the Judiciary, and thanks to some tailor-made legislative changes, a practice antithetical to the rule of law. (For details, see Viktor Z. Kazai and Ágnes Kovács.)

As a response to the criticism, the same person, the President of the *Kúria* issued a statement and "forcefully rejected every attempt questioning or destroying judicial independence". The statement seems to abuse the reference to judicial independence to pre-empt both criticism of the government and that of courts loyal to the government. Furthermore, the statement also misunderstands the concept of judicial independence, which does not mean that judges are sacrosanct and judicial decisions cannot be subjected to a public debate. Quite to the contrary: judicial independence prescribes that judges are only subjected to the law. And this goes hand in hand with judicial accountability, which again is there to scrutinize whether judges are indeed only subjected to the rule of law. Judicial accountability is meaningless if judgments cannot be debated.

The HVG may now turn to the HCC, which is seen, despite all evidence to the contrary, in the case-law of the ECtHR as an effective remedy to be exhausted before turning to Strasbourg. (See *Szalontay v. Hungary*, and the analysis by Dániel Karsai). The HCC may sit on the case for years, as it often does, since no deadlines are foreseen for deciding constitutional complaints, but sooner or later the dispute will reach the ECtHR. And if so, the Good Lobby Profs would happily assist HVG on a pro bono basis.

One can only hope that in the meantime Hungarian courts return to their earlier well-established jurisprudence protecting freedom of expression and nobody will remember the rights-limiting days of the *Kúria*, when the HVG is rightfully afforded just satisfaction in Strasbourg.
